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April 18, 2005

VIA FACSIMILE

Chairman Randolph
and Commissioners Blair, Downey, Huguenin and Remy
Fair Political Practices Commission
428 "J" Street, Suite 620
Sacramento, CA 95814

Re: Pre-Notice Adoption of Regulation 18571 – Payment to the General Fund of Laundered Contributions

Dear Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy:

We represent a respondent in an enforcement action pending before the Commission in which the primary issue in dispute is the applicability of Government Code section 85701 when a committee learns that the funds it received were laundered, only after having spent that money on a long-concluded campaign. We are, therefore, one of the committees that the Enforcement Division now tells you "misunderstand[s] section 85701"; we also are one of the committees that "have argued that the statute requires the return of only that portion of the contribution which remains once the committee becomes aware that the contribution was laundered . . . ." (Memorandum dated Apr. 5, 2005 from T. Finley, et al. re Pre-Notice adoption of Regulation 18571, pp. 1-2.)

We were surprised to see this item on the Commission's agenda for three reasons. First, it is our understanding that the Commission generally does not consider proposed regulations affecting an enforcement action while the action is pending. The regulation under consideration would resolve the primary issue in our case.

Second, the Administrative Procedures Act prohibits ex parte communications from your Enforcement Division staff on the matters at issue in a pending enforcement action.

> While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the

> presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (Gov. Code, § 11430.10.)

We were not provided notice by the Enforcement Division that this regulation would be presented, or that it had been discussing this issue with the Legal Division and would be bringing that discussion to the Commission. Such notice and an opportunity for response are required by Government Code section 11430.50.

Third, our attempts to bring this issue to the Commission through certification of a legal question pursuant to FPPC Regulation 18361.3 were rebuffed by the Enforcement Division. We are enclosing a redacted version of a letter we wrote to the Enforcement Division on June 14, 2004 in which we specifically requested that the division "present the question of the interpretation of the statute to the Commission." (Letter dated June 14, 2004 from J. Harrison to S. Russo and J. Sly, p. 2.) Our request was rejected. (Letter dated June 15, 2004 from J. Sly to J. Harrison.) We were therefore surprised to see this very same issue appear before the Commission in the form of a proposed regulation, without any notice to us in the enforcement proceeding.

The remedy for a breach of the ex parte communication rules is to provide the respondent with notice and an opportunity for comment. Because we learned of this proposed regulation only late Friday, and could not confirm until today that our case remained pending, our initial response must necessarily be abbreviated. However, it is crucial both to our pending enforcement case, and to the Commission's review of this proposed regulation, that the Commission be provided a fuller description of the context in which this issue has arisen, and our arguments against the staff's proposed interpretation of the statute.

This matter involves a ballot measure committee sponsored by a non-profit organization. The committee accepted a contribution from a donor in 2002 and, along with the other funds it raised, spent the contribution almost immediately. Two years later, the donor stipulated to a judgment in which the donor admitted to violating Government Code section 84301. The committee did not know that the donor did not have sufficient funds in its account at the time that the contribution was made, or that funds had been transferred from another donor in order to cover the contribution. The committee did not become aware of these facts until long after the campaign was over and the funds had been spent. When the Enforcement Division approached the committee about this matter, the committee explained these facts and, in good faith, agreed to refund an amount the committee had on hand that could potentially be traced to the laundered contribution.

The Enforcement Division has taken the position, however, that the committee must return the entire amount, notwithstanding the fact that it no longer has the funds and did not learn about the violation until after they had been spent. This approach raises numerous practical and legal problems. As discussed at length in a memorandum that we presented to the Enforcement Division, and which is attached to this letter, the Enforcement Division's proposed construction of the statute would convert section 85701 into a penalty. The statute, however, was intended to be a remedial corollary to the prohibition against contributions made through an intermediary; it was not intended to punish a committee that received and spent a contribution in good faith before learning that it was tainted. Furthermore, because the committee no longer has the funds, it would have to raise new funds in order to disgorge the contribution, or use funds raised for another ballot measure to pay what in essence is no longer disgorgement, but a fine. Likewise, the amount at issue exceeds by nearly three times the fine imposed on the donor. Application of the statute to the committee, therefore, would have the effect of imposing a greater fine even though the committee did not engage in any wrongdoing.

The Enforcement Division's proposed construction of the statute raises also serious questions under the First Amendment, the Due Process Clause, and the Excessive Fines Clause of the Eighth Amendment. These issues are set forth at length in the attached memorandum. To avoid these issues and to interpret the statute in a manner that gives effect to the voters' intent, the Commission should construe section 85701 to require a committee to disgorge a contribution only if it still retains the contribution (or some portion of it) at the time the committee learns the contributions was made in violation of section 84301.

Thank you for your consideration of this matter

Sincerely,

James C. Harrison

JCH:NL
Enclosure

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June 14, 2004

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EVIDENCE CODE SECTION 1152

VIA MESSENGER

Steve Russo, Chief of Enforcement Division
Jeff Sly, Enforcement Division Attorney
Fair Political Practices Commission
801 J Street
Sacramento, CA 95814-2503

Re *Refund of Contribution Pursuant to Government Code Section 85701*

Dear Steve and Jeff:

Enclosed please find a check for $[redacted] payable to the General Fund of the State of California. This amount represents the [redacted] Committee's lowest reported balance between [redacted], the date that the Committee received a $[redacted] contribution from [redacted], and [redacted], the date that [redacted] stipulated that they had violated Government Code section 84301 By paying this amount, the Committee in no way concedes that it owes $[redacted]. In fact, the Committee spent [redacted] contribution almost immediately, long before it learned that the contribution was made in violation of section 84301.[1] Furthermore, under the methodology the Commission approved for the transfer of pre-Proposition 34 funds, which assumes that the pre-

[1] During the period from January 20, 2002, through February 16, 2002, the Committee received contributions totaling $[redacted] and spent $[redacted], and during the period from February 17, 2002, through June 30, 2002, the Committee received contributions totaling $[redacted] and spent $[redacted]. At the end of [redacted] ten months before the FPPC filed suit against [redacted] alleging a violation of section 84301, the Committee's balance was $[redacted]. As these reports demonstrate, the Committee spent [redacted] contribution long before it learned of the violation.

Proposition 34 funds are the last funds expended (Cal. Code Regs. tit. 2, § 18530.2), the most that would remain from [redacted] contribution would be $[redacted], the lowest bank balance between the Committee's receipt of the contribution and the entry of judgment.

Nonetheless, in a good faith effort to comply with the law, even under the most rigorous tracing methodology, and without admitting liability, the Committee has determined to pay $[redacted] to the state General Fund. Government Code section 85701 requires a committee that receives a contribution made in violation of Government Code section 84301 to refund the contribution to the state General Fund. As we have discussed at length, and as set forth in the attached memorandum, which is incorporated herein, the statute was intended to be a remedial corollary to the prohibition against contributions made through an intermediary; it was not intended to punish a committee that received and spent a contribution in good faith before learning that the contribution was tainted. Requiring a committee that has already spent the funds to disgorge the contribution would convert the statute into a penalty and undermine the intent of the voters. This construction would also raise serious constitutional questions, discussed at length in the attached memorandum, under the First Amendment, the Due Process Clause, and the Excessive Fines Clause of the Eighth Amendment. To avoid these constitutional issues and to give effect to the voters' intent, section 85701 must be construed to require a committee to disgorge a contribution only if it still retains the contribution (or some portion of it) at the time the committee learns that the contribution was made in violation of section 84301.

Based on this construction and the methodology the Commission approved for the transfer of pre-Proposition 34 funds, the Committee hereby repays $[redacted] in full compliance with the requirements of section 85701. If the Enforcement Division nonetheless decides to initiate an enforcement action, the Committee requests the opportunity to discuss this matter with you and to present the question of the interpretation of the statute to the Commission.

Thank you for your consideration of this matter.

Sincerely,

James C. Harrison

JCH:bks

Enclosures

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MEMORANDUM

VIA FACSIMILE AND REGULAR MAIL

Steve Russo and Jeff Sly

From: James C. Harrison and Thomas A. Willis

April 27, 2004

Application of Section 85701 to [redacted]
(Our File No.: [redacted])

INTRODUCTION

You have asked whether Government Code section 85701, which requires the disgorgement of laundered contributions, applies to a $[redacted] contribution received by [redacted] from [redacted] in January 2002. At the time [redacted] received the contribution, it did not know that [redacted] did not have sufficient funds in its company account to cover the contribution or that [redacted] had transferred $[redacted] from a personal account to [redacted] within a week of making the contribution. The [redacted] did not become aware of these facts until well after it spent the funds to support Proposition [redacted], which appeared on the March 2002 ballot. [redacted] stipulated to a judgment in which [redacted] admitted to violating Government Code section 84301, which prohibits a person from making a contribution in the name of another person, and agreed to pay a fine of $[redacted]. The [redacted] was not a party to the case.

Now, based on the stipulated judgment, you have asked us why the FPPC should not compel [redacted] to refund the contribution to the state General Fund pursuant to section 85701. The answer is simple: Refunding the contribution is an impossibility, because [redacted] spent the [redacted] contribution more than two years ago, long before it learned that the contribution was made in violation of section 84301.

Requiring [redacted] to repay $[redacted] now would convert what was intended to be a remedial provision into a penalty, overturn a long-standing Commission regulation governing the duty of inquiry, deprive [redacted] of its First Amendment and due process rights, and violate the Eighth Amendment prohibition against excessive penalties.

ANALYSIS

A. Section 85701 Only Applies When the Recipient Knows the Contribution is Tainted Before it Spends the Funds

1. Statutory Construction

Both the statutory context of Government Code section 85701 and its legislative history demonstrate that the section was intended to be a remedial provision, not a penalty for innocent recipient committees. At best, the forfeiture provision was meant to ensure that the launderer does not succeed in evading contribution limits; it was never meant to punish a committee by requiring it to disgorge funds that it had long ago, and in good faith, spent.

In 1996, California voters adopted the predecessor to Government Code section 85701, which provided as follows:

> Any person who accepts a contribution which is not from the person listed on the check or subsequent campaign disclosure statement shall be liable to pay the state the entire amount of the laundered contribution. The statute of limitations shall not apply to this provision, and *repayments to the state shall be made as long as the person or any committee controlled by such person has any funds sufficient to pay the state.*
>
> (Proposition 208, Proposed Section 85701, emphasis added.)[1]

[1] There is absolutely no evidence that the phrase "any funds sufficient to pay the state" was meant to refer to anything other than the funds contributed in violation of section 84301. For our purposes, however, this issue is irrelevant because [redacted] does not have "funds sufficient to pay the state." At the end of 2002, [redacted] had a balance of $[redacted] and its current balance is approximately $[redacted].

Proposition 34 repealed Proposition 208, but reenacted some of its provisions, including section 85701. As the Commission has recognized, Proposition 34, in reenacting section 85701, simply "restate[d] a nearly identical provision of Proposition 208." (*In re Pelham* Opinion, FPPC File No. O-00-274, 15 FPPC Op. 1, 7 (2001).) Section 85701 now provides:

> Any candidate or committee that receives a contribution in violation of Section 84301 shall pay to the General Fund of the state the amount of the contribution.
>
> (Gov. Code, § 85701.)

As its legislative history suggests, section 85701 was intended to be a remedial provision, not a penalty. (*In re Pelham*, 15 FPPC Op. at 8.) It is similar to a provision in the Los Angeles City Charter, which provides in part:

> No person shall make a contribution in his, her, or its name of anything belonging to another person or received from another person on the condition that it be used as a contribution. *In the event it is discovered by a candidate or committee treasurer that a contribution has been received in violation of this subsection, the candidate or treasurer shall promptly pay the amount received in violation of this subsection to the City Treasurer for deposit in the General Fund of the City.*
>
> (Los Angeles City Charter, art. 4, § 470(k), emphasis added.)[2]

Both section 85701 and the Los Angeles City Charter are "remedial corollar[ies] to a primary statutory enforcement provision – the ban on laundered contributions." (*In re Pelham*, 15 FPPC Op. at 8.) Thus, the intent of these provisions is to enforce the ban against laundered contributions by requiring a committee that either knowingly receives a laundered contribution or that learns that a contribution is tainted before the funds are spent to refund the contribution to the State or to the City, thereby insuring that the wrongdoer does not succeed in evading contribution limits. It is *not* to punish an innocent recipient committee that has lawfully and in good faith expended the funds.

---

[2] *See also* 18 U.S.C. § 983(d) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."); *United States v. United States Coin and Currency* (1971) 401 U.S. 715, 721-722 ("When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.").

In Los Angeles, for example, the city Ethics Commission notified several committees that they had received laundered contributions in 1998 through 2000 from Mattel, Inc. (LACEC Case No. 2001-18-A; FPPC No. 02/984.) Those committees that still had the funds voluntarily returned them to the city General Fund. Several committees, however, had already spent the funds. These committees did not return the funds, and it is our understanding that the Ethics Commission did not attempt to enforce section 470(k) against those committees. Requiring a committee to refund a contribution, notwithstanding the fact that it spent the funds before it had knowledge of a violation, would undermine the intent of the statute by converting it into a penalty.[3] Like the Los Angeles City Charter, section 85701 should be read to require disgorgement only when the committee that received the funds had knowledge of the violation before spending the funds.[4] (*People v. One 1951 Ford Sedan* (1954) 122 Cal.App.2d 680, 685 [noting that courts have read a knowledge requirement into statutes requiring forfeiture in order to preserve the constitutionality of the statutes].)

This construction is also necessary to avoid an absurd result. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113 [the "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."].) Section 85701 must be read to include an element of knowledge, because it would be impossible for a recipient who does not know that the contribution was made in violation of section 84301 to comply with the statute. Likewise, a committee cannot "disgorge" funds that it no longer has.

---

[3] During its consideration of the *Pelham* opinion, the Commission recognized that "[i]f the committee was required to give the funds to the local jurisdiction after already giving them to the state jurisdiction, it would amount to fining the committee." (FPPC Minutes, March 9, 2001, at p. 11.) This observation is reflected in the *Pelham* opinion: "It goes without saying that disgorgement can occur only once, and the law does not impose on a recipient the unreasonable burden to disgorge the contribution to two different entities. . . . We believe this interpretation avoids unnecessary constitutional questions and comports with general notions of fairness and justice." (*In re Pelham*, 15 FPPC Op. at 8.) The same logic applies here. If a committee were compelled to return funds that it had innocently spent, it would amount to a penalty and would raise serious constitutional questions.

[4] The Commission's legal staff has acknowledged that section 85701 is ambiguous with respect to the timing of the refund. (FPPC Minutes, March 9, 2001, at p. 11; *see Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1271, emphasis added ["If the statutory language on its face answers [a] question, that answer is binding *unless we conclude the language is ambiguous or it does not accurately reflect the Legislature's intent.*"].) It is therefore appropriate for the Commission to construe the statute in a manner that gives effect to its intent, and in doing so, it may consider similar statutory schemes. (*People v. A Blue Chevrolet Astro* (2000) 83 Cal.App.4th 322, 325, 327 [construing statute to avoid forfeiture where owner did not know loaned car was to be used in illicit activity].)

A strict liability standard would also lead to an absurd result under the specific facts of this case. The FPPC fined [redacted] $[redacted] for [redacted] admitted violation of the intermediary and reporting provisions of the Political Reform Act, yet under a strict liability standard, [redacted] would be forced to pay more than three times that amount even though it did not know that the contribution was laundered.

2. **Commission Policy Regarding the Duty of Inquiry**

Failure to read a requirement of knowledge into section 85701 would also overturn a longstanding Commission regulation regarding the duties of a committee's treasurer. Under Regulation 18427, the duty to inquire is limited to those circumstances actually known to the treasurer. The duty to inquire does not extend to circumstances a treasurer "'might' or 'should have known' if he or she had gone beyond his or her required duties." (Cal. Code Regs., tit. 2, § 18427, Comment.) As the Commission has explained,

> For example, Mr. Jones may give Mr. Smith $100 in cash and instruct him to write a check to the candidate's controlled committee and to conceal the true source of the contribution. The committee reports the contribution as received from Smith. If neither the candidate nor the treasurer has any knowledge concerning the questionable nature of the contribution and neither, through performance of their respective duties (such as monitoring campaign records or reviewing campaign statements), could have learned any facts that would lead one to question the contribution, the candidate and treasurer would have no duty of inquiry with respect to the contribution. There is no duty of inquiry even though if Smith were asked he would have revealed the true source of the funds.
>
> (*Id.*)

A strict liability standard would reverse Commission policy and force committees to ask contributors whether they are, in fact, the true source of the funds, or to screen contributors' bank statements before accepting contributions to ensure that contributors have sufficient funds available to cover their contributions. Even under these circumstances, of course, a contributor could lie or obscure the source of funds to his or her bank account. Regardless of its efforts to screen out laundered contributions, a committee would, under a strict liability standard, ultimately be liable for a penalty equal to the amount of the tainted contribution.

B. A Strict Reading of Section 85701 Would Pose Serious Constitutional Problems

The rules of statutory construction also require a statute to be read to avoid constitutional issues. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1197 ["It is well established that, if reasonably possible, statutory provisions should be interpreted in a manner that avoids serious constitutional questions."].) A strict liability construction of section 85701 poses several constitutional problems.

1. The First Amendment

Under a strict liability standard, section 85701 would be facially overbroad because it would reach conduct, like [redacted] innocent receipt of a contribution, that is protected by the First Amendment. (*See Broadrick v. Oklahoma* (1973) 413 U.S. 601, 611-612.) If a law reaches a substantial amount of constitutionally protected conduct, it is unconstitutional on its face, even if it has legitimate application. (*Village of Schaumburg v. Citizens for A Better Environment* (1980) 444 U.S. 620, 634.) This rule applies with particular force in the First Amendment context because "those who desire to engage in legally protected expression . . . may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." (*Brockett v. Spokane Arcades, Inc.* (1985) 472 U.S. 491, 503.)

Section 85701, if interpreted to apply regardless of a recipient's knowledge, would reach a "substantial amount of constitutionally protected conduct," because it would require a ballot measure committee to refund a contribution long after it spent the funds, even though it had no knowledge that the contribution was made in violation of the law. (*See Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 876-877 [holding that Communications Decency Act was overbroad, in part, because it applied even when a sender of indecent material did not intend to send the material to a minor]; *American Civil Liberties Union v. Johnson* (10th Cir. 1999) 194 F.3d 1149, 1157; *compare Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 200 [holding that statute was not overbroad because specific intent was element of statute].) This construction would chill free speech and promote self-censorship because committees would be compelled to undertake costly and time-consuming investigations about the true source of contributions. (*See FEC v. Massachusetts Citizens for Life* (1986) 479 U.S. 238, 255-256 [imposing burdensome administrative and organizational costs can discourage protected speech to the point of causing First Amendment infringement].) If section 85701 were enforced against innocent recipient committees, like [redacted] "it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." (*Id.* at 255.) Such a chilling effect on core political speech is impermissible.

A strict liability standard would also violate the First Amendment as applied to [redacted]. Limits on ballot measure committees are subject to "exacting scrutiny" and are upheld only if the law furthers a compelling state interest and is narrowly tailored to achieve that purpose. In particular, limits on contributions to ballot measure

committees are prohibited. (*Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290; *see also First National Bank of Boston v. Belloti* (1978) 435 U.S. 765 [invalidating law prohibiting corporations from making contributions to ballot measure committees]; *Pro-Life Council, Inc. v. Getman* (9th Cir. 2003) 328 F.3d 1088, 1104 [holding that disclosure requirements for ballot measure committees must withstand strict scrutiny].)

Section 85701, as applied to contributions to support or oppose ballot measures, is not narrowly tailored. While the state may have a compelling interest in preventing money laundering, section 85701 is not narrowly tailored to achieve this goal, because the state has other, more direct enforcement mechanisms. Government Code section 84301, for example, prohibits a person from making a contribution in the name of another person, and section 83116.5 imposes liability on a person who purposely or negligently causes any other person to violate the law. Furthermore, section 91000 provides that a knowing or willful violation of that provision is a misdemeanor, punishable by a fine of up to three times the amount of the unlawful contribution, and section 91004 permits a civil prosecutor to bring a civil action and assess a penalty equal to the full amount of the contribution not properly reported. These provisions provide complete protection against a violation of section 84301; an ancillary penalty against an innocent third party is not narrowly tailored to achieve that goal. (*See McIntyre v. Ohio Elections Commission* (1995) 514 U.S. 334, 349-350 ["Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify § 3599.09(A)'s extremely broad prohibition."].)

Nor is disgorgement narrowly tailored to achieve the goal of disclosure. Rather, this goal could be achieved simply by requiring a recipient committee immediately to amend its campaign statements to accurately reflect the true source of funds upon discovery that a contribution was laundered. (*Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 299-300 ["The integrity of the political system will be adequately protected if contributions are identified in a public filing revealing the amounts contributed . . ."].)

Even if the goal of section 85701 is remedial, it is not narrowly tailored. First, unlike contributions to candidates, contributions to ballot measure committees are not subject to contribution limits. A person who launders a contribution to a ballot measure committee evades disclosure requirements, not contribution limits. Thus, while the state may have a legitimate interest in ensuring proper disclosure, it does not have a compelling interest in preventing the use of the funds. Second, even if it the state has a legitimate remedial interest, section 85701, if applied regardless of a recipient's knowledge, would not be narrowly tailored to achieve that purpose; rather, it would permit the civil prosecutor to seek repayment of a tainted contribution long after the contribution has been spent and the election is over. Recovery after the contribution has been spent, however, is punitive, not remedial. Furthermore, under section 91004, the civil prosecutor can impose a fine on the wrongdoer equal to the amount of

the laundered contribution. An after-the-fact penalty against an innocent recipient committee is not necessary to serve a remedial purpose.

Finally, if [redacted] were forced to repay the money now, it would have to do so, in part, out of funds raised for future ballot measure campaigns. The result would be to limit [redacted]'s participation in later campaigns in violation of its free speech rights.

2. **The Eighth Amendment**

Application of section 85701 to [redacted] would result in an excessive penalty in violation of the Eighth Amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to civil forfeitures that are, in part, punitive in nature. (*Austin v. United States* (1993) 509 U.S. 602, 610 ["We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish."]; *see also United States v. Bajakajian* (1998) 524 U.S. 321, 329 ["Deterrence . . . has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss."].) Here, [redacted] spent [redacted] contribution more than two years ago, in the good faith belief that the contribution was legitimate. At the end of 2002, the [redacted] had cash on hand of only $[redacted], and it currently has a balance of approximately $[redacted]. [redacted] would therefore have to raise more than $[redacted] money that could be used to engage in protected speech, in order to refund an amount equal to [redacted] contribution to the state General Fund. Because [redacted] no longer has the funds, application of section 85701 would serve no remedial purpose; it would be purely punitive.

A penalty of $[redacted] would also be excessive. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (*United States v. Bajakajian*, 524 U.S. at 334.) [redacted] did not violate the Political Reform Act; rather it accepted and spent a contribution in good faith. The proposed penalty has no relationship to any wrongdoing by [redacted]. By definition, therefore, it is excessive. The fact that [redacted] who has admitted to violating the law, paid a fine of only $[redacted] reinforces this conclusion.

3. **The Due Process Clause**

The due process clause and basic notions of fairness and justice require that a person have the opportunity to conform his or her conduct to the law before a penalty is imposed.

(*See e.g., People v. Stevens* (1986) 189 Cal.App.3d 1020, 1025.) [redacted] however, had no opportunity to avoid the penalty because it had no knowledge that the contribution was made in violation of Government Code section 84301 before it spent the funds. Section 85701, if applied regardless of a recipient's knowledge, would violate the due process clause because it would permit the FPPC to deprive [redacted] of $[redacted] without any relationship to wrongdoing by [redacted]. (*See, e.g., Southwestern Telegraph & Telephone Co. v. Danaher* (1915) 238 U.S. 482, 490-491 ["There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. . . . In these circumstances to inflict upon the company penalties aggregating $6,300 was plainly arbitrary and oppressive as to be nothing short of a taking without due process."].)

A strict liability standard would also violate the due process clause in another way. [redacted], of course, was not a party to [redacted], yet its liability is premised upon the judgment entered in that case. The due process clauses of the state and federal Constitutions prohibit a judgment from being entered against an entity in a proceeding in which the entity was not a party. (*See Lambert v. California* (1957) 355 U.S. 225, 228; *Bronco Wine Co. v. Logoluso Farms* (1989) 214 Cal.App.3d 699, 717; *Environmental Coalition of Orange County, Inc. v. Local Agency Formation Comm.* (1980) 110 Cal.App.3d 164, 173 ["Since the City of Anaheim was not made a party to the instant action, calling the city to task in this action for its alleged failure to adhere to [the law] would be a denial of due process."].)

In *Slaughter v. Edwards* (1970) 11 Cal.App.3d 285, for example, the Court of Appeal held that a state law deprived a real estate broker of due process because it provided for the revocation of his license based upon a collateral determination in a proceeding to which the broker was not a party. After plaintiffs obtained a judgment for fraud against the broker, they filed an application in the same court for an order directing payment of the judgment from a state fund. In order to obtain payment from the state fund, plaintiffs had to show that they had obtained a judgment for fraud in a transaction in which a license was required and that the broker, based on a review of his assets, could not satisfy the judgment. Plaintiffs served the application, as required by law, on the Real Estate Commissioner, who was charged with defending the state fund. The broker appeared as a witness at the court's hearing on the application but was not a party. At the end of the hearing, the trial court determined that the fund could be invaded to satisfy the judgment. Under state law, the broker's license was automatically suspended upon entry of an order against the state fund. (*Id.* at 288-289.) Because the broker was not a party to this collateral proceeding, the Court of Appeal held that he had been deprived of due process:

> It is thus apparent that the suspension of the license is not made mandatory upon the rendition of the judgment against the licensee

> upon the grounds of fraud, but upon the determination by the court in the collateral proceeding to invade the Fund and upon the evidence adduced at that proceeding. The court in the latter proceeding makes an independent determination as to whether the judgment is one obtained on the grounds of fraud, misrepresentation, or deceit with reference to a transaction for which a real estate license was required. In sum, the court in the collateral proceeding examines the facts, resolves any conflicts in the evidence, and exercises its judgment in respect thereto. This determination is the event upon which the licensee's license is automatically suspended. Yet the licensee, since he is not a party to the proceeding, is not permitted to show that the claim is one which may not properly be levied against the Fund.
>
> (*Id.* at 295.

The same is true here. [redacted] was not a party to [redacted]. Its liability, however, is premised upon the determination in that action that [redacted] violated the law. Because [redacted] liability under section 85701 is based upon the determination of a violation of section 84301 in a proceeding to which it was not a party, application of section 85701 would deprive [redacted] of due process.

To avoid these constitutional problems, the Commission should interpret section 85701 to apply only under the following circumstances: (1) when the recipient committee knowingly receives a laundered contribution and (2) when the recipient committee learns that a contribution was made in violation of section 84301 before spending the funds.

C. Enforcement of Section 85701 in These Circumstances Poses Practical Problems

In an administrative action, the penalty for violation of section 85701 would be limited to $5,000. (Gov. Code, § 83116(c).) A civil action for injunctive relief demanding payment of funds that have already been spent would amount to an action for damages. (*See Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 778-779.) The civil penalty for violation of section 85701 would therefore be limited to $5,000. (Gov. Code, § 91005.5) Even if these limitations did not apply, it would be difficult to enforce a judgment against a committee that has already spent the funds. Furthermore, the Commission's delay of almost two years after [redacted] filed a major donor statement disclosing [redacted] affiliation with [redacted] would constitute laches. (*See, e.g., Tustin Community Hosp., Inc. v. Santa Ana Community Hosp. Assn.* (1979) 89 Cal.App.3d 889.)

CONCLUSION

[redacted] spent [redacted] contribution more than two years ago, in the good faith belief that the contribution was legitimate. To require repayment now would not only undermine the intent of section 85701, it would be grossly unfair and unconstitutional. Indeed, the penalty would amount to more than three times the fine imposed on [redacted].

To date, the Commission has not interpreted or enforced section 85701. Because section 85701 poses so many serious legal issues, we request that you refer the question of the interpretation of the statute to the Commission pursuant to Regulation 18361(c) if you decide to proceed with an enforcement action.

JH:NL

FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

June 15, 2004

James Harrison
Remcho, Johansen & Purcell
201 Dolores Ave
San Leandro, California 94577

Re: [redacted]
FPPC No. [redacted]

Dear James:

This will confirm our receipt of your June 14, 2004 letter, along with a [redacted] check (No. 0001281) in the amount of $[redacted], made payable to the General Fund of the State of California.

The Enforcement Division will forward the check from [redacted] to the Department of General Services on your/their behalf. We will treat the check as a partial payment toward the total amount of $[redacted] we believe is due. Our actions should in no way be construed to reflect any agreement by us to compromise the total amount we believe is due to the State of California by the [redacted], or any of its affiliate organizations, pursuant to section 85701 of the Government Code, resulting from the receipt of the $[redacted] contribution it received from [redacted] in January 2002.

As we have stated, [redacted] is required by section 85701 to pay to the General Fund of the State of California the entire amount of the $[redacted] contribution, and no amount less than $[redacted] will satisfy that requirement.

As to your request to discuss this matter and to present the question to the Commission prior to the Enforcement Division initiating any enforcement action, we believe that you and your client have had ample opportunity to do both. Should the Enforcement Division choose to initiate an enforcement action, we shall consider ourselves free to do so without further notice to you or [redacted].

Sincerely,

Jeffery A. Sly
Commission Counsel
Enforcement Division